



APPENDIX

COVINGTON & BURLING

: January 21, 1961

Arthur H. Dean, Esq.
Sullivan & Cromwell
48 Wall Street
New-York 5, New York

Dear Mr. Dean:

In connection with the pending appeal before the Supreme Court in *Sam Fox Publishing Company, Inc., et al. v. United States and ASCAP*, No. 56, October Term 1960, appellants believe it would assist the Court in its consideration of the appeal to have before it information relating to the recent balloting for ASCAP Directors by the members of the Society under the provisions of the 1960 judgment entered by Judge Ryan. I am therefore submitting to you as counsel for the Society appellants' request for the following information:

1. State the breakdown of the total possible vote, and the votes actually cast, in the 1960 election by writer and publisher members respectively. This information could perhaps most readily be supplied in the form indicated by the table on page three of the letter by Mr. Howard Milman to Mr. Herbert Cheyette, dated September 4, 1959. To keep the figures consistent with the prior tabulation, it would probably be desirable to include among the votes cast the ballots which were improperly voted and improperly signed, but to state separately the ballots invalidated.

2. State the total publisher revenue distributed for 1959 and 1960 (for the latter year to the extent available).

3. With regard to each of the 36 publisher members of the Society (defined as the publisher member and its affiliates) casting the highest number of publisher votes in the 1960 election, state separately the revenue distribution for 1959 and 1960 (for the latter year to the extent available), the amount of performance credits upon which

each publisher's votes were calculated, and the votes cast by each in the recent Board election for ASCAP Directors, in a form such as the following:

Name of Designation of Publisher	1959 Revenue	1960 Revenue	Performance Credits Upon Which Votes Were Based	Votes Cast
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4. If the Carl Fisher and G. Schirmer companies are not among the publishers listed in response to paragraph 3, state for each of these companies the information requested in paragraph 3.

5. State the publisher members, and the votes cast separately by each, who voted pursuant to Section IV(E) of the 1960 judgment for the election of Messrs. E. H. Morris and Bernard Goodwin, respectively, as members of the Society's Board of Directors.

I would be happy to discuss the above request for information with you at your convenience. Please do not hesitate to telephone me if there is anything that is not clear about the information requested.

Yours very truly,

CHARLES A. HORSKY

cc: The Solicitor General
of the United States
Washington 25, D. C.

SULLIVAN & CROMWELL
48 Wall Street, New York 5,

January 26, 1961

Charles A. Horsky, Esq.
Messrs. Covington & Burling
Union Trust Building
Washington 5, D. C.

Dear Mr. Horsky:

I have been out of town and did not see your letter of January 21st until today.

It seems to me that your appeal in *Sam Fox Publishing Co., Inc. et al. v. United States et al.* presents the legal question whether your clients were entitled to intervene as of right in the District Court, and that there is no factual issue to be resolved in the Supreme Court. The record made in the District Court should be adequate to present the legal question.

I should point out that your request for information on the voting of members at the last election raises a very serious problem. You will recall that at the hearing before Chief Judge Ryan, you argued in connection with the provision whereby members with 1/12th of the eligible writers' and publishers' votes could elect a director:

"This would be publicly done, not privately done—with the possibility of reprisals, the possibility of all sorts of things of that nature—" (Record on Appeal, p. 378).

In response, I assured the Court that ASCAP would

"... arrange for these members who wished to get up such a petition to sign it secretly . . . so that there won't be any fear of reprisal." (Record on Appeal, p. 466)

I understand that the ballots have been sealed and that the information which you request is not disclosed to the officers or directors of ASCAP, and I believe should not be disclosed.

Nor do I think it would be proper for ASCAP to make public the amount of its distribution to individual members. The Judgment entered by Judge Ryan carefully provided that the ASCAP records containing such information shall be open for inspection by a member only for good cause.

Judge Ryan's decision was based upon the record before him. I do not believe that the Court would be assisted in its consideration of the legal question presented by going outside the record in the manner you suggest. I should think it would be a mistake if the parties to the

appeal were to start offering new evidence in the Supreme Court not only on this but other subjects.

I should, of course, be happy to discuss this matter with you further if you so desire.

Very truly yours,

/s/ ARTHUR H. DEAN
Arthur H. Dean

cc: The Solicitor General
of the United States,
Washington 25, D. C.

COVINGTON & BURLING

March 14, 1961

Howard T. Milman, Esq.
Sullivan & Cromwell
48 Wall Street
New York 5, New York

Dear Mr. Milman:

Although I understood that my request for information addressed to Mr. Dean on January 21, 1961 comprehended the information I now desire, I would be very much obliged if you would supply to me the information referred to on page 53 of the brief for ASCAP in the Supreme Court, which you state has been supplied to the Department of Justice and on the basis of which the figures contained in the brief at page 53 were calculated. Needless to say, I should like the information as promptly as possible.

Very truly yours,

(Signed) CHARLES A. HORSKY

CAH/eg
cc: Archibald Cox, Esq.

SULLIVAN & CROMWELL
48 Wall Street, New York 5,

March 15, 1961

Charles A. Horsky, Esq.,
Messrs. Covington & Burling,
Union Trust Building,
Washington 5, D. C.

Dear Mr. Horsky:

In response to your letter of March 14, 1961, the information you request is as follows:

The total number of publisher votes eligible to be cast at the last election of directors was 5,197. The aggregate number of votes eligible to be cast by the top ten publisher groups was 1,651, or 31.88% of the total. The aggregate number of votes eligible to be cast by the Schirmer and Fisher groups was 76, or 1.47% of the total.

Very truly yours,

HOWARD T. MILMAN
Howard T. Milman

cc: Hon. Archibald Cox,
The Solicitor General,
Department of Justice,
Washington 25, D. C.

COVINGTON & BURLING

March 16, 1961

Howard T. Milman, Esq.
48 Wall Street
New York, N. Y.

Dear Mr. Milman:

Pursuant to our conversation this morning, this letter sets forth the questions we considered on the telephone with respect to the voting in the last ASCAP election by the top ten publisher groups.

We would like to obtain the names of the top ten publishers referred to on page 53 of the brief for ASCAP in the Supreme Court.

We would also like to be informed of the breakdown of the eligible votes held by each of the above top ten publishers in the last election for the Board of Directors.

Finally, I inquired whether the reference to the "aggregate number of votes eligible to be cast" by the top ten publisher groups included the votes of any such publishers that were cast for a candidate to the Board of Directors under the petition procedure created by Section IV(E) of the 1960 judgment.

Yours truly,

ALVIN FRIEDMAN

rmw

SULLIVAN & CROMWELL
48 Wall Street, New York 5,

March 17, 1961

Alvin Friedman, Esq.,
Messrs. Covington & Burling,
Union Trust Building,
Washington 5, D. C.

Dear Mr. Friedman:

This will acknowledge your letter of March 16, 1961.

As I indicated in our telephone conversation, we see nothing which would justify the disclosure of confidential information as to the votes of individual publishers.

With respect to the "aggregate number of votes eligible to be cast", these votes could be cast either under the petition procedure or in the general election of directors, at the option of the member.

Yours truly,

HOWARD T. MILMAN
Howard T. Milman

SUPREME COURT OF THE UNITED STATES

No. 56.—OCTOBER TERM, 1960.

Sam Fox Publishing Company, Inc., et al., Appellants, v. United States, et al.	}	On Appeal From the United States District Court for the Southern District of New York.
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[May 29, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

The appellants, proceeding under the Expediting Act, 15 U. S. C. § 29, appeal directly to this Court from an order of the District Court for the Southern District of New York denying their motions to intervene as of right in a proceeding to modify a consent decree previously entered in a government antitrust suit. The appellants were not named as parties either in the suit or modification proceeding.¹ The motions were made pursuant to Rule 24, subdivision (a)(2) of the Federal Rules of Civil Procedure.²

The matter arises in the following setting: In 1941 the United States brought suit under § 1 of the Sherman Act,

¹ Besides Sam Fox Publishing Company there are two other appellants, Pleasant Music Publishing Company and Jefferson Music Company who, like Sam Fox, are music publishers. Although Movietone Music Corporation also appealed, it did not appear in this Court.

² "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . ."

The appellants also moved below for permissive, or discretionary, intervention under subdivision (b) of Rule 24, but no appeal has been taken from that part of the District Court's order.

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15 U. S. C. § 1, against the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated association of which appellants are members, and certain of its officers. The Society and the defendant officers besides being named as an entity and individuals, respectively, were also sued as representatives of all members of the Society. The Society, comprising some 6,400 writers and publishers of musical compositions, was organized to take nonexclusive licenses to the works of its members, to license such works out for public performance, and to distribute among the members the revenues resulting therefrom. The three appellants are among the Society's publisher members.

The Government's complaint in the action was aimed at two distinct types of antitrust violation: (1) alleged restraint of trade arising out of ASCAP's mode of dealing with outsiders desiring licenses of compositions in the Society's catalogue; and (2) alleged restraint of competition among the Society's members *inter sese*, resulting from the asserted domination of the Society's affairs by a few of its large publisher members who, it was claimed, were able to control the complexion of the Board of Directors and the apportionment of the Society's revenues. As to the latter type of restraint, the prayer for relief sought to insure (a) that Board elections be by no method "other than by a membership vote in which all . . . members shall have the right to vote," and (b) that the distribution of revenue to members should be on an "fair and non-discriminatory basis." It is apparent from the record that appellants' particular interests in the suit related entirely to the second aspect of the Government's charges, that is those involving the Society's internal affairs, and that their motions to intervene were so directed.

During the same year in which the suit was brought it was settled by a consent decree, approved by the Dis-

trict Court. In addition to provisions dealing with what may be called the Society's external affairs, the decree, in broad terms, contained requirements for Board elections by membership vote and for revenue distributions on an equitable basis. Subsequent to the decree, both the vote of the members and their share of license revenues were accorded on a weighted basis relative to the particular member's contribution to the revenue-producing value of all members' contribution to the Society's catalogue, as determined by the Board of Directors. In 1950, pursuant to a reservation-of-jurisdiction clause in the 1941 decree, a modification of the original decree was effected at the instance of the Government. The modified decree ordered, among other things, that "in order to insure a democratic administration of the affairs of defendant ASCAP . . . [the composition of the] Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions. . . ."

In 1959, this same concern for "democratic administration of the [internal] affairs" of ASCAP and for an equitable distribution of license revenues led the Government to press for further amendments to the decree. In 1960 this resulted in additional court-approved modifications which, it is apparent, represented a substantial improvement over the earlier provisions relating to Board elections and the apportionment of revenues. Contending that the proposed modifications did not go far enough towards ameliorating the position of the small publishers as against the few large publishers, appellants, prior to the adoption of the modified decree, brought the intervention motions now before us. The District Court denied leave to intervene without opinion, stating in its order:

" . . . representation of the public and the applicants by the Department of Justice was adequate and in

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the public interest; . . . applicants are members of and are represented by the Society with their consent; . . . applicants have permitted this cause in which they are not named as parties to proceed to judgment; and . . . it would not promote the interests of the administration of justice to permit the requested intervention. . . ."

Thereafter the District Court entered a judgment approving the proposed modifications to the existing consent decree. Appellants do not appeal from that judgment, but only from the order denying their motions to intervene as of right. We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 364 U. S. 801.

As the Government and appellants correctly agree, the controlling question on the issue of jurisdiction, the answer to which also determines the merits of this appeal, is whether the appellants were entitled to intervene in these proceedings as "of right." *Sutphen Estates v. United States*, 342 U. S. 19, where the Court said: "If appellant may intervene as of right, the order of the court denying intervention is appealable." *Id.*, p. 20. That case requires rejection of ASCAP's separate contention that the order below was not appealable because not final,³ and also its further contention that appellate review of intervention has become moot, in that no appeal was taken from the judgment eventuating from the proceedings in which intervention was sought. The latter contention is based on the erroneous hypothesis that review of the intervention order was obtainable only in connection with an appeal from such judgment.

³ *Allen Calculators, Inc., v. National Cash Register Co.*, 322 U. S. 137, need not be considered to the contrary, for it would seem that the significance of the appeal which was there taken from the judgment below related to this Court's jurisdiction to consider the District Court's denial of *permissive* intervention, and not to its jurisdiction to review the District Court's order denying intervention as of right.

The determinative question—whether appellants were entitled to intervene as “of right”—depended upon their showing both that “the representation of” their “interest by existing parties” to the consent judgment modification proceeding was or might “be inadequate,” and that they would or might “be bound by [the] judgment” in such proceeding. See note 2, *supra*.

I.

Appellants first contend that the representation of their interests by the Government has proven inadequate. Although the most recent decree reduced and limited the Board representation of the 10 largest publishers and provided for a method of revenue apportionment more favorable than that of the past to the smaller and less well-established Society members, appellants' contention is that this amelioration of their position is not adequate to break the control of the larger publishers, and therefore the Government's representation was or may have been inadequate.

Apart from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. However, we need not reach the question of the adequacy of the Government's representation of the appellants' interests because, as hereafter shown, it is in any event clear that appellants are not bound by the consent judgment in these proceedings, if their position in this litigation is deemed as aligned with that of the Government. See *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 119.

We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the even-

tuality of such litigation, and hence may not, as of right, intervene in it. In *United States v. Borden Co.*, 347 U. S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that "private and public actions were designed to be cumulative, not mutually exclusive" (*id.*, at 518), and, quoting from *United States v. Bendix Home Appliances*, 10 F. R. D. 73, 77, "[T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *Id.*, at 518-519.

This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is stranger, so private parties, similarly situated, are not bound by government litigation. See *United States v. General Electric Co.*, 95 F. Supp. 165; *United States v. Columbia Gas & Electric Corp.*, *supra*; *United States v. Radio Corporation*, 3 F. Supp. 23; *United States v. Bendix Home Appliances*, *supra*; cf. *United States v. Loew's, Inc.*, 136 F. Supp. 13. Indeed §§ 4 and 16 of the Clayton Act, making an adjudication of liability in a government antitrust suit *prima facie* evidence of liability in a private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter.

Regarding appellants' position in the case from this aspect, we conclude that they were not entitled to intervene as of right. See *Allen Calculators, Inc., v. National Cash Register Co.*, 322 U. S. 137, 140-141.

II.

The contention of the appellants that they are entitled to intervene because as members of ASCAP they might be bound by ASCAP's representation of their interests presents a more difficult question. Their claim is that the Society acting through its Board of Directors could not adequately represent their interests as small publishers, whose very claim is that they are caught between the practical need to remain in the Society and the impossibility of obtaining adequate representation on the Board of Directors which determines both the weighting of votes in Board elections and the distribution of Society revenues. Since the Board, which negotiated the present consent judgment with the United States, represents, in the words of the Government's complaint, the core of the very "unlawful combination and conspiracy" against which appellants seek antitrust relief, it is hardly doubtful, taking, as we think we should, the record before us at face value, that ASCAP, acting through its Board, cannot in law be deemed adequately to represent appellants' discrete interests asserted against the Board.

But before the inadequacy of ASCAP's representation of appellants' interests in the consent decree negotiations can give rise to a right of intervention, appellants must further demonstrate that they are or may be bound by the judgment on the litigation. On this score appellants argue that as "class" defendants they are bound by the consent judgment against ASCAP, an unincorporated association, which was sued both as an entity (Fed. Rules Civ. Proc., 17 (b)) and as representing all the Society's members (Fed. Rules Civ. Proc., 23 (a)(1)). See *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 148 F. 2d 403.

In so arguing, appellants, however, face this dilemma: the judgment in a class action will bind only those mem-

bers of the class whose interests have been adequately represented by existing parties to the litigation, *Hansberry v. Lee*, 311 U. S. 32; yet intervention as of right presupposes that an intervenor's interests are or may not be so represented. Thus appellants' argument as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid, appellants should not be considered as members of the same class as the present defendants, and therefore are not "bound." On the other hand, if appellants are bound by ASCAP's representation of the class, it can only be because that representation has been adequate, precluding any right to intervene. It would indeed be strange procedure to declare, on one hand, that ASCAP adequately represents the interests of the appellants and hence that this is properly a class suit, and then, on the other hand, to require intervention in order to insure of this representation in fact. The cases establishing the principle of class suits, *Smith v. Swormstedt*, 16 How. 288; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; and see *Hansberry v. Lee*, *supra*, present no such situation and require no such result.

Any doubt that may exist in this case is dispelled once it is recognized that the Government's original complaint alleged two different types of antitrust violations, two different illegal combinations. It is doubtless true that appellants, through their membership in ASCAP, are or "may be" bound by the consent judgment insofar as it deals with the *external* affairs of the Society; nor is there any claim on this score that ASCAP's representation was not fully adequate.* It does not follow from this, however,

* The issue of inadequacy of representation could arise on this phase of the case only on some showing that ASCAP, which ostensibly has the same interests as appellants on this aspect of the litigation, were in fact conducting the litigation in bad faith, collusively, or negligently. No such contention has been made.

that as to the other alleged antitrust violations, which are of an entirely different nature, involving the interests of the members *inter sese*, that the Society itself is a valid unitary representative for this purpose also, containing as it does the principal factions in the internecine dispute. Cf. *Owen v. Paramount Productions*, 41 F. Supp. 557. Or, put differently, as to any claims or defenses which appellants have *against the Government* the representation of ASCAP is entirely adequate, and as to any claims which they may have *against ASCAP* there is nothing to require appellants to bring them into this litigation, simply because they are "bound" for other purposes. Cf. Fed. Rules Civ. Proc., 13 (g).

Turning to the order of the District Court, its remarks that the appellants as "members of the defendant Society . . . surrendered . . . (their) right to intervene as individuals," (R. 295) and that they "are members of and represented by the Society with their consent" are susceptible of two interpretations. If the Court was referring simply to the assertedly representative nature of the suit, its view was no different from the appellants' contention discussed above, and the answer to it is also the same. The purport of the order, however, appears to have been, as the District Court elsewhere intimated, that quite apart from the actual divergence of interest and position between ASCAP and appellants, the contractual and associational relation between the Society and its members, into which they were free to enter and from which they were free to withdraw, at least so far as the law is concerned, both bound appellants as privies to this judgment and precluded any claim of inadequate representation. With respect, we think this begs the question, for appellants' antitrust claim is precisely that, on the one hand, they have no practical choice but to remain in the Society and, on the other, that the dominance of the large

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